

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
BRITZ FERTILIZERS INC., JOHN PEREZ AND)	FCC File Nos. 0001055385-0001055386,
SONS, DELTA CONTAINER CORP, RICH)	0001055390-0001055397
EDWARDS, TODD JOB, MANNA RANCH INC.)	
D/B/A ACAMPO AG SERVICES, CALIFORNIA)	
WASTE RECOVERY SYSTEM, BILL STOKES,)	
JJ RIOS FARM SERVICES INC., JOSEPH)	
BEELER AND RONALD SIVERIA D/B/A J.R.)	
LASER FINISHING)	
)	
For 900 MHz Trunked Business Station Licenses)	
in California		

ORDER ON RECONSIDERATION

Adopted: March 25, 2004

Released: April 14, 2004

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

1. On May 9, 2003, Britz Fertilizer Inc., John Perez and Sons, Delta Container Corp., Rich Edwards, Todd Job, Manna Ranch Inc. d/b/a Acampo AG Services, California Waste Recovery System, Bill Stokes, JJ Rios Farm Services Inc., Joseph Beeler and Ronald Siveria d/b/a J.R. Laser Finishing (collectively "Applicants") filed requests for reconsideration ("Petitions")¹ of the dismissals of their respective applications to operate on various 900 MHz frequencies ("Dismissals").² Applicants asked that

¹ See Britz Fertilizer Inc. (Britz), Petition for Reconsideration of Application Dismissal (filed May 9, 2003); John Perez and Sons (Perez) Petition for Reconsideration of Application Dismissal (filed May 9, 2003); Delta Container Corp. (Delta) Petition for Reconsideration of Application Dismissal (filed May 9, 2003); Rich Edwards (Edwards) Petition for Reconsideration of Application Dismissal (filed May 9, 2003); Todd Job (Job) Petition for Reconsideration of Application Dismissal (filed May 9, 2003); Manna Ranch Inc. d/b/a Acampo AG Services (Acampo) Petition for Reconsideration of Application Dismissal (filed May 9, 2003); California Waste Recovery System (California Waste) Petition for Reconsideration of Application Dismissal (filed May 9, 2003); Bill Stokes (Stokes) Petition for Reconsideration of Application Dismissal (filed May 9, 2003); JJ Rios Farm Services Inc. (Rios), Petition for Reconsideration of Application Dismissal (filed May 9, 2003); Joseph Beeler and Ronald Siveria d/b/a J.R. Laser Finishing (Laser) Petition for Reconsideration of Application Dismissal (filed Jan. 7, 2003) ("Petitions").

² See Britz Automated Dismissal Letter, Ref. Number 1814396, effective April 9, 2002, generated April 10, 2003; Perez Automated Dismissal Letter, Ref. Number 1817669, effective April 11, 2002, generated April 14, 2003; Delta Automated Dismissal Letter, Ref. Number 1817665, effective April 11, 2002, generated April 14, 2003; Edwards Automated Dismissal Letter, Ref. Number 1817666, effective April 11, 2002, generated April 14, 2003; Job Automated Dismissal Letter, Ref. Number 1817668, effective April 11, 2002, generated April 14, 2003; Acampo Automated Dismissal Letter, Ref. Number 1817671, effective April 11, 2002, generated April 14, 2003; California Waste Automated Dismissal Letter, Ref. Number 1814397, effective April 9, 2003, generated April 10, 2003; Stokes Automated Dismissal Letter, Ref. Number 1817672, effective April 11, 2002, generated April 14, 2003; Rios Automated Dismissal Letter, Ref. Number 1817667, effective April 11, 2002, generated April 14, 2003; and Laser Automated Dismissal Letter, Ref. Number 1817670, effective April 11, 2002, generated April 14, 2003 ("Dismissals").

the Dismissals be reversed and their license applications reinstated.³ They further requested that their respective applications be returned to permit correction of their defects.⁴ For the reasons set forth below, we deny the Petitions.

2. On October 10, 2002, Applicants filed their respective license applications to operate on certain private land mobile radio channel pairs available for Business use in the 900 MHz frequency band, for the purpose of coordinating their individual business activities.⁵ Between April 9 and April 11, 2002, the Licensing and Technical Analysis Branch (LTAB), of the former Public Safety and Private Wireless Division, of the Wireless Telecommunications Bureau (Bureau)⁶ dismissed the subject applications⁷ on the basis that operations from certain locations of all of the requested 900 MHz frequency pairs⁸ would be less than seventy miles (113 km) from the transmitter site of certain co-channel stations.⁹ LTAB apprised the Applicants that Section 90.621(b) of the Commission's Rules requires license applicants desiring to operate on 900 MHz channels at distances less than seventy miles from co-channel facilities to submit with their applications either a waiver request¹⁰ or a letter of consent from each licensee operating a constructed and operational station within the seventy miles.¹¹ The Applicants were further informed that each application that proposes short-spacing by letter of consent is required to include a letter(s) that certifies that the consenting licensee's facilities are constructed and operational,¹² and a certificate of service indicating that a copy of the application has been served on the consenting licensee.¹³ Since the consent letters provided by the Applicants did not certify that the consenting stations were constructed and operational and no certificate of service was provided, LTAB found the applications defective and

³ Petitions at 2.

⁴ *Id.*

⁵ See e.g., Britz FCC Application File No. 0001055385 (filed for the purpose of directing the sales and distribution of fertilizers); Perez FCC Application File No. 0001055386 (filed for the purpose of coordinating the activities of a trucking company); California Waste FCC Application File No. 0001055394 (filed for the purpose of coordinating trash and recycling activities).

⁶ The Commission reorganized the (Bureau), effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. See Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414 ¶ 2 (2003).

⁷ Dismissals at 1.

⁸ The requested frequency pairs are as follows: 896/935.2375 MHz, 896/935.9125 MHz, 900/939.6500 MHz, and 900/939.6875. See e.g., Delta FCC Application File No. 0001055390; Edwards FCC Application File No. 0001055391.

⁹ These co-channel stations are as follows: Stations WPUA912, KNNQ620, WNQQ810, WPOX855, WPRU308, and WPWG329. Use of frequency: 896/935.9125 MHz from location 1 would be short-spaced to Station WPUA912, licensed to Applied Materials (Applied); 900/939.6500 MHz from location 1 would be short-spaced to Station KNNQ620, licensed to Advanced Micro Device (AMD), and to Station WNQQ810, licensed to Shell Communications (Shell); 900/939.6875 MHz from location 1 would be short-spaced to Station KNNQ620, licensed to AMD, and to Station WNQQ810, licensed to Shell; 896/935.2375 MHz from location 6 would be short-spaced to Station WPOX855, licensed to A&A Transport (A&A), and Station WNQQ810, licensed to Shell; 896/935.9125 MHz from location 7 would be short-spaced to Station WPRU308, licensed to Griffin Wireless Services (Griffin); 896/935.2375 MHz from location 8 would be short-spaced to Station WNQQ810, licensed to Shell and to Station WPWG329, licensed to Aeronautical Radio (AR).

¹⁰ See 47 C.F.R. § 90.621(b)(4).

¹¹ See 47 C.F.R. § 90.621(b)(5).

¹² 47 C.F.R. § 90.621(b)(5) also requires that the letters of concurrence indicate that an applicant and each co-channel licensee agree to accept any interference resulting from the reduced separation between their systems.

¹³ Dismissals at 1.

dismissed them.¹⁴ Applicants then filed the petitions seeking reconsideration of that action.

3. In the Petitions, the Applicants submit that the applications, as originally filed, comply substantially with the Commission's requirements and, thus, the actions necessary to cure their defects are minor and can be easily accomplished.¹⁵ We disagree. First, the Applicants must provide certificates of service indicating that all concurring co-channel licensees have been served with an actual copy of the subject application.¹⁶ Further, the letters of concurrence must not only certify that the system of the concurring licensee is constructed and fully operational, but, pursuant to the provisions of Section 90.621(b)(5) of the Commission's Rules, the consent letters must indicate that the Applicants and each co-channel licensee agree to accept any interference resulting from the reduced separation between their systems.¹⁷ The Applicants failed to meet this mandate as well. Moreover, certain letters of concurrence were missing in their entirety.¹⁸ Contrary to the Applicants' view, the defects in their applications are not minor and may or may not be easily cured. While short-spacing of stations serves the purposes of spectrum efficiency and allows more licensees to conduct operations than would otherwise be possible, the consent procedure protects the operations of previously licensed co-channel stations from harmful interference while permitting flexibility in the granting of additional licenses, thus serving the public interest. Consequently, the requirements governing letters of concurrence must be carefully observed.

4. While it may be more convenient from the Applicants' perspective, for their applications to be returned rather than dismissed,¹⁹ it is neither in the best interests of other license applicants nor the Commission's processes. When an application is significantly defective, dismissal without prejudice serves the regulatory purposes of administrative efficiency and fairness to other applicants.²⁰ This enables the filing of complete and accurate license applications by other applicants and, thus, serves the public interest.²¹ Given that the subject applications were not dismissed with prejudice, the Applicants are able to file new, complete applications and seeking the same authorizations, should they so desire.

5. Based upon our review of the record before us, we are not persuaded by the Applicants' argument that they are being treated unfairly because short-spaced private multiple address system (MAS) applications with defective consent letters have been returned, while short-spaced private land mobile

¹⁴ *Id.*

¹⁵ Petitions at 2.

¹⁶ Applicants submit that they have undertaken steps necessary to ensure that the consent letters include the proper certification of station construction. *Id.*

¹⁷ See 21st Century Wireless Group, Inc., *Order on Reconsideration*, 17 FCC Rcd 8260, 8261 ¶ 4 (WTB PSPWD 2002), Nextel Communications, Inc., *Order*, 16 FCC Rcd 7892, 7898 ¶ 12 (WTB CWD 2001), Hawaiian Wireless Partners, *Order*, 11 FCC Rcd 21192, 21194 n.11 (WTB 1996).

¹⁸ Consent letters were received from the following: Applied, licensee of Station WPUA912, for use of 896/935.9125 MHz; A&A, licensee of Station WPOX855, for use of 896/935.2375 MHz; Shell, licensee of Station WNQQ810, for use of 896/935.2375 MHz, 900/939.6500 MHz and 900/939.6875 MHz; and AMD, licensee of Station KNNQ620, for use of 939.6875 MHz. See FCC File Nos. 0001055385-0001055386, 0001055390-0001055397, Attachment List. However, additional letters of concurrence were needed from the following: AMD, licensee of Station KNNQ620 (for use of 900/939.6500 MHz); Griffin, licensee of Station WPRU308 (for use of 896/935.9125 MHz); and AR, licensee of Station WPWG329 (for use of 896/935.2375 MHz).

¹⁹ Petitions at 2.

²⁰ See Interstate Consolidation, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 3330, 3335 ¶ 11 (2000).

²¹ See generally, 47 U.S.C. § 154(j) (Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice).

radio (PLMR) applications with defective consent letters are dismissed.²² Although both MAS and PLMR services permit stations to be short-spaced if letters of concurrence are submitted, the established criteria for each differ. By way of example, pursuant to Section 101.105(c)(3)(ii) of the Commission's Rules, a MAS applicant is to submit an engineering analysis to show the coordination of the proposed facility with existing systems located closer than the required separation standard, and a statement that all the parties accept the level of interference calculated in such analysis.²³ In contrast, no engineering analysis is required of a PLMR applicant by Section 90.621(b)(5) of the Commission's Rules. Rather, a decision permitting short-spacing of private land mobile radio stations under this provision may be based solely on the presence of consent letters and not on a technical study of interference potential, as is required of MAS applicants.²⁴ In PLMR situations, co-channel licensees and the applicant must consent to "any interference" that results from the proposed operation; whereas, in MAS cases, co-channel licensees and the applicant need only consent to the level of interference calculated by the engineering analysis. In view of these significant distinctions, we believe that it is both reasonable and consistent with the applicable rules for LTAB to process these two categories of applications differently.

6. We also conclude that *Green Country Mobilephone v. FCC (Green Country)*,²⁵ cited by Applicants' as justification for reconsideration of the Dismissals, is inapposite to the instant situation. The Court in *Green Country* held that the Commission had abused its discretion in refusing to grant waiver of a deadline for filing applications since it had inconsistently applied the rule.²⁶ First, *Green Country* involved a procedural matter, while the instant case involves a substantive one. Second, short-spaced PLMR applications with deficient consent letters²⁷ or without the requisite consent letters²⁸ are routinely dismissed. Thus, similar cases are treated similarly in compliance with the court's holding.²⁹ Third, as discussed *supra*, it is reasonable to distinguish between PLMR and MAS applicants because the requirements for short spacing in the two services materially differ. Consequently, we affirm LTAB's decision and deny the reconsideration requests.

²² In support of this contention, Applicants cite MAS Application File No. 0001044232, filed by the City of Southlake, Texas, in which Southlake was given time by the Commission to rectify the insufficiencies of its short-spacing agreements. *See also* Petitions at 2-3.

²³ 47 C.F.R. § 101.105(c)(3)(ii).

²⁴ *See* 47 C.F.R. § 90.621(b)(5).

²⁵ 765 F.2d 235 (D.C. Cir. 1985). *See* Petitions at 4.

²⁶ *Id.* at 237.

²⁷ *See e.g.*, ConocoPhillips Communications Inc., *Order*, DA 03-4079, ¶ 3, n. 14 (WTB PSCID 2003).

²⁸ *See e.g.* White Eagle Concrete, Inc., *Order on Reconsideration*, 18 FCC Rcd 15172, 15173 ¶ 4 (WTB PSPWD 2003).

²⁹ 765 F.2d at 237.

7. IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.106 and 90.621 of the Commission's Rules, 47 C.F.R. §§ 1.106, 90.621, the Petitions for Reconsideration of Application Dismissal filed by Britz Fertilizer Inc., John Perez and Sons, Delta Container Corp., Rich Edwards, Todd Job, Manna Ranch Inc. d/b/a Acampo AG Services, California Waste Recovery System, Bill Stokes, JJ Rios Farm Services Inc., Joseph Beeler and Ronald Siveria d/b/a J.R. Laser Finishing on May 9, 2003, ARE DENIED, as indicated herein.

8. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau